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Supreme Court, U. S.
FILED
AUG 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Misc. No. .....

JUDY CRAFT, ROBERT SAMUEL YOUNG, MELVINA YOUNG, AMOS LANE BRIDGES, KATHLEEN MAUDE MUCKENSTRUM, LIZ WILSON and COLLEEN BURNS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 3, 1975.

OPINION BELOW

The opinion of the Court of Appeals is, as yet, unpublished, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1975. On July 30, 1975, this Court entered an order extending the time to file a Petition for Writ of Certiorari to and including September 1, 1975. Jurisdiction of this Court is envoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Should a Federal Court address itself to the constitutionality of a state statute in a federal criminal case charging use of interstate facilities to violate a said statute?

2. Does an instruction stating that the defendant "may rely" upon evidence brought out on examination of Government witness improperly shift the burden of proof to the defendant?

3. What criteria shall be applied in determining whether a prosecutor's opening remarks regarding the credibility of a Government witness constitute reversible error?

STATUTES INVOLVED

Title 18, United States Code, § 1952 (a) and (b)

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> > (1) distribute the proceeds of any unlawful activity; or
> >
> > (2) commit any crime of violence to further any unlawful activity; or

> > (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisonment for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

State of West Virginia Code, Chapter 61-8-5(b):

> ". . . (b) Any person who shall engage in prostitution, lewdness, or assignation, or who shall solicit, induce, entice, or procure another to commit an act of prostitution, lewdness or assignation; or who shall reside in, enter or remain in any house, place, building, hotel, tourist camp, or other structure, or enter or remain in any vehicle, trailer or other conveyance for the purpose of prostitution, lewdness or assignation; or who shall aid, abet, or participate in the doing of any of the acts therein prohibited, shall upon conviction for the first offense under this section, be punished by imprisonment in the county jail for a period of not less than sixty days, nor more than six months, and by a fine of not less than fifty dollars and not to exceed one hundred dollars . . ."

STATEMENT

A. Convictions and Sentences

This is an appeal from the judgments, convictions and sentences of the United States District Court for the Southern District of Florida, wherein defendants Robert Young, Amos Lane Bridges, Melvina Young, Kathleen Maude Muckenstrum, Judy Craft, Colleen Burns, and Isabel Prince were convicted of one count of conspiracy to engage in interstate prostitution activities in violation of Title 18 United States Code, §1952, and defendants Robert Young, Amos Lane Bridges, and Melvina Young were convicted of one count of inducing a woman to engage in interstate prostitution activities in violation of Title 18, United States Code, §2422, and further, defendants Robert Young, Amos Lane Bridges, and Kathleen Maude Muckenstrum were convicted of one count of engaging in interstate prostitution activities in violation of Title 18, United States Code §1952.

Appellant Robert Young was sentenced to three years on each of the three counts of which he was convicted; such sentence to be served consecutively for a total of nine years.

Appellant Bridges was sentenced to three years on each of the three counts of which he was convicted; such sentence to be served consecutively for a total of nine years, pursuant to Title 18, United States Code, §4208(a)(2).

Appellant Prince was sentenced to two years on the one count of which she was convicted, and was granted a "split sentence", pursuant to Title 18, United States Code, §3651, such that all but sixty days of her sentence was suspended.

Appellant Craft was sentenced to two years on the count of which she was convicted, pursuant to Title 18, United States Code, §3651, such that all but sixty days of her sentence was suspended.

Appellant Muckenstrum was sentenced to two years on each of the two counts of which she was convicted; such sentence to run concurrently; and she was granted split sentence treatment, pursuant to Title 18, United States Code, §3651, such that all but thirty days of her sentence was suspended.

Appellant Melvina Young was sentenced to two years on each of the two counts of which she was convicted; such sentence to run concurrently; and she was granted split sentence treatment, pursuant to Title 18, United States Code, §3651, such that all but ninety days of her sentence was suspended.

The United States Court of Appeals for the Fifth Circuit affirmed the convictions with regard to all defendants except Isabel Prince, whose conviction was reversed on grounds of insufficient evidence.

B. Summary of Trial Record

No issue is raised in this petition regarding the sufficiency of the evidence as to the convicted defendants except insofar as point I may be interpreted as a sufficiency question. Consequently, no summary of the evidence will be made except as to those areas relating to the issues sought to be brought before this Court.

During his opening statement, government counsel, referring to his principal witness, stated: "She is going to tell you the truth. She is going to tell you how it all happened." Upon the defense motion for a mistrial, the Court denied the motion, but instructed the jury to disregard the statement.

Thereafter, the Government presented the testimony of several witnesses, then requested that the Trial Court take judicial notice of the West Virginia Statute, Chapter 61-8-5(b) of the

State of West Virginia Code (TR. 658). Over defendants' objections to the constitutionality of the aforesaid statute, which fails to define "prostitution", the Trial Court, taking judicial notice, concluded that the statute is constitutional in that West Virginia would revert to the common law definition of prostitution (TR. 659-663, 739-740) and, accordingly, instructed the jury, over objections, that prostitution, *as defined by the Court*, is illegal in West Virginia.

Defendants specifically objected to various other instructions given by the Court, particularly to the instruction regarding burden of proof and reasonable doubt (TR. 828-829).

C. Court of Appeals Opinion

Although petitioners raised and argued the constitutionality of the West Virginia Statute, the Court of Appeals declined to rule on the issue stating: "There is no need to prove a violation of the state law as an essential element of the federal crime, and therefore the failure to define a generic term according to the state law is not error."

With regard to the burden of proof instruction the Appellate Court found the instruction "in its entirety did not shift the burden of proof to the defendant."

Finally, with regard to the comment by the prosecution in opening statements, the Court cautioned that it is "dangerous business for a prosecutor to state to the jury that the Government vouches for the honesty of its witness, but found the cautionary instruction given by the Trial Court was "sufficient to avoid error in the failure to grant a mistrial."

REASONS FOR GRANTING THE WRIT

1. The Decision Below Fails to Recognize That Where a Specific State Statute Is Charged in a Section 1952 Indictment, the State Law Must Be Constitutionally Sound in Order to Support a Conviction.

Five counts of the instant indictment allege offenses under Title 18, United States Code, § 1952, which prohibits using interstate facilities to promote or carry on "any unlawful activity." These counts further specify that the "unlawful activity" alleged was in violation of Chapter 61-8-5-(b), State of West Virginia Code. Consequently, a violation of the West Virginia Law was an essential element of the offense charged under Title 18, United States Code, § 1952, in Counts I, V, VII, and VIII of the indictment.

This factor was recognized by the Assistant United States Attorney in requesting that the Court take judicial notice of the West Virginia Statute. The government attorney stated:

> "Mr. Ferguson: Well, the purpose being that the cases say that the offense of prostitution must be illegal in the states in which the girls were supposed to have traveled. Therefore, I am asking the Court to take judicial notice of the fact that it is illegal to commit prostitution in West Virginia."
>
> * * * * * * * *
>
> "Mr. Ferguson: I do know it is encumbent upon the Government not to prove that prostitution actually took place, but it is encumbent upon the government to prove that prostitution was in violation of the laws of the State. I am merely asking the Court to recognize the fact that it is against the law in the State of West Virginia to commit prostitution" (Tr. 659).

This general principle is supported in *United States v. Kahn*, 412 F.2d 272 (2 Cir. 1973), cert. denied 411 U.S. 982; *United States v. Cerone*, 452 F.2d 274 (7th Cir. 1972), cert. denied 405 U.S. 964.

Since it was essential to both the pleading and proof that prostitution be illegal in the State of West Virginia, there can be no violation of the federal law unless the West Virginia Statute is constitutionally valid. However, the West Virginia Statute is on its face unconstitutionally vague and indefinite.

The Statute reads as follows:

> ". . . (b) Any person who shall engage in prostitution, lewdness, or assignation, or who shall solicit, induce, entice, or procure another to commit an act of prostitution, lewdness or assignation; or who shall reside in, enter or remain in any house, place, building, hotel, tourist camp, or other structure, or enter or remain in any vehicle, trailer or other conveyance for the purpose of prostitution, lewdness or assignation; or who shall aid, abet, or participate in the doing of any of the acts therein prohibited, shall upon conviction for the first offense under this section, be punished by imprisonment in the county jail for a period of not less than sixty days nor more than six months, and by a fine of not less than fifty dollars and not to exceed one hundred dollars . . ."

Nowhere within the Statute is the term "prostitution" defined, nor have the West Virginia Courts clarified the term. Moreover, the Statute, in elaborating on the activity prohibited uses the term "lewdness or assignation", both of which are subject to widely differing interpretations. Additionally, the term "prostitution" itself has been assigned various definitions by courts and legislatures. For example, the Florida Statute contains the following definition:

> "a) The term 'prostitution' shall be construed to include the giving or receiving of the body for *sexual intercourse for hire* and shall be construed to include the giving or receiving of the body for *licentious sexual intercourse without hire*. Florida Rev. Stat. § 796.07(a)."

At 73 C.J.S. PROSTITUTION § 1, the term is defined as follows:

> "The word 'prostitution' is not a technical one and has no common law meaning. It is defined as the practice of a female offering her body to indiscriminate sexual intercourse with men, or common lewdness of a female, as distinguished from sexual intercourse confined to one man, harlotry or whoredome . . . it may also be defined as the act of submitting to indiscriminate sexual intercourse which the woman solicits whether or not she receives compensation for the act."

In fact, several state legislatures and courts have interpreted the offense to include indiscriminate sexual intercourse whether or not for hire. See eg: *State v. Thuna*, 109 P. 331 (Wash. 1910); *State v. Poague*, 72 N.W. 2d 620 (Minn. 1955); *State v. Gardner*, 156 N.W. 747 (Iowa, 1916); *State v. Perry*, 436 P. 2d 252 (Ore. 1967); *People v. Webb*, 25 NYS 2d 554 (1941); *State v. Simpson*, 50 N.W. 2d 661 (N.D. 1951); *State v. Marsh*, 196 N.W. 930 (Minn. 1922); *State v. Bourg*, 182 So. 2d 510 (La. 1966). Texas courts have recognized an interesting distinction between a "prostitute" and a "common prostitute", with only the latter being a violation of the law. See: *Levy v. State*, 208 S.W. 667 (Tex. 1919), and the Minnesota Courts have held that indiscriminate posing in the nude is punishable under a prostitution ordinance. *State v. Ray*, 193 N.W. 2d 315 (Minn. 1971).

Accordingly, there is no universal judicial definition of "prostitution", and, absent a legislative definition, the West

Virginia Statute can be made to apply to various types of sexual conduct depending on the view of the enforcing officers.

This Court has long recognized that penal statutes containing terms subject to varying interpretations are void as unconstitutionally vague.

As the Court has stated in *Lanzetta v. New Jersey*, 306 U.S. 451, at 453:

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg v. California*, 283 U.S. 359, 368; *Lovell v. Griffin*, 303 U.S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Construction Co.*, 269 U.S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at is meaning and differ as to its application, violates the first essential of due process of law'."

The Court, in *Connally v. General Construction Co.*, 269 U.S. 385, went on to say:

> ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture, the citizens cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions." at 393.

See also *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *United States v. Petrillo*, 332 U.S. 1 (1947); *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921).

The deficiency in the West Virginia Statute brings into focus the additional problem in determining what definition of prostitution the grand jury sitting in Florida utilized in returning the indictment. Apparently, under Florida law, the term included "licentious sexual intercourse without hire." Consequently, a particular act may be "prostitution" in Florida, but not prostitution in West Virginia.

In attempting to remedy this difficulty, the Trial Court specifically noted the absence of a definition in the West Virginia Statute, but sought to apply "the common law definition" despite the fact "prostitution is not a crime at common law." (TR. 660) Accordingly, the Trial Court overruled defendants' motions to dismiss and for judgment of acquittal, and, over defendants' objections, took judicial notice of the West Virginia Statute and instructed the jury that prostitution is illegal in West Virginia.

However, it is submitted that such an ad hoc judicial definition can in no way remedy the constitutional defect inherent in the Statute. The Court, therefore, should have dismissed the indictment upon the motion duly filed by defendants, and for the same reasons committed reversible error when over specific objection the Court instructed the jury to the effect that, "the State of West Virginia outlaws prostitution", and that, "prostitution is defined as sexual intercourse for hire."

The Court of Appeals in concluding that under *United States v. Nardello*, 393 U.S. 286, it was sufficient that the acts proven "fall within the generic term charged, failed to recognize that the indictment did not charge interstate activities for "immoral purposes", but rather interstate activities for purpose of violating a specific state statute. This factor was recognized by the government attorney when he stated:

"Your honor, since the indictment states only the word 'prostitution,' I can find no argument upon which to request 'immoral purpose' charge." (TR. 844)

Consequently, guidance is needed from this Court in determining whether under such an indictment the federal courts should consider the constitutional validity of a state statute.

2. **Guidance Is Needed From This Court in Fashioning an Appropriate Burden of Proof—Reasonable Doubt Instruction.**

Both trial and appellate courts have been floundering in their attempts to adequately define and instruct on the burden of proof and the meaning of reasonable doubt. See eg: *Miles v. United States*, 103 U.S. 304 (1880); *Dunbar v. United States*, 156 U.S. 185, 199 (1895); *Speiser v. Randall*, 357 U.S. 513, 523, 534 (1958); *Compton v. United States*, 305 F 2d 119 (9th Cir. 1962); *United States v. Barbera*, 486 F 2d 333 (2d Cir. 1973); *United States v. Crisco*, 493 F 2d 232 (8th Cir. 1974).

In the instant case the Trial Court gave the following instruction:

"The burden of proving a defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or produce any evidence. He may rely upon evidence brought out on examination of witnesses for the Government. If the Government fails to prove a defendant guilty beyond a reasonable doubt, the jury must find him not guilty.

"A reasonable doubt means a doubt that is based on reason and common sense. It does not mean a mere possible doubt or a speculative or imaginary or forced doubt,

because anything related to human affairs is open to some possible or imaginary doubt. It is the kind of doubt which would cause a reasonable person to hesitate in making a decision or in taking an important step in some serious matter in his own private affairs.

"A reasonable doubt exists whenever after careful and impartial consideration of all of the evidence in a case, the jurors do not feel convinced to a moral certainty that the defendant is guilty of the charge.

"So if the jury views the evidence of the case as reasonably permitting either of the two conclusions, one of innocence and the other of guilty, the jury should, of course, adopt the conclusion of innocence." (TR. 859-860)

In contrast to the above instruction, petitioners requested the burden of proof—reasonable doubt instruction recommended in *Devitt and Blackmar, Federal Jury Practice and Instructions* (1970), § 11.01 (TR. 828). This instruction reads as follows:

"The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a 'clean slate'—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So, the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

"It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reasons and common sense—the kind of doubt that would make a

reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely upon it unhesitatingly in the most important of your own affairs.

"The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

"The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case, the burden or duty of calling any witness or producing any evidence.

"A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. So, if the jury views the evidence in the case as reasonably permitting either of the two conclusions—one of innocence, the other of guilty—the jury should, of course, adopt the conclusions of innocence."

Comparing the two instructions set out above, it is apparent that the *Devitt & Blackmar* instruction emphasizes the principle that the government has the burden of proof, that the defendant need not prove anything, and defines proof beyond a reasonable doubt in terms of proof sufficient to cause the jury to act "unhesitatingly in the most important of your own affairs." On the other hand, the Trial Court's instruction tends to place at least a minimal burden on the defendant by stating:

> "The law does not require a defendant to prove his innocence or to produce any evidence. He *may rely* on evidence brought out on examination of witnesses for the Government." (Emphasis supplied)

Of course, it is well established that the defendant need not "rely" on any evidence and to say that he may rely on evidence

brought out on cross-examination implies that there must be some evidence (whether "produced" by the government or defendant) upon which defendant bases his case.

In view of the confusion which exists as to an appropriate Burden of Proof-Reasonable Doubt Instruction, it is submitted that this Court should address itself to the problem and enunciate guidelines to be followed by the lower courts.

3. **This Court Should Provide Criteria for Determining the Extent of Permissible Comment by a Prosecutor on the Credibility of Government Witnesses.**

The purpose of an opening statement is to give broad outlines of the case to enable the jury to comprehend it; it is not to poison the jury's mind against the defendant and it is not to recite items of highly questionable evidence. *Government of Virgin Islands v. Turner*, 409 F. 2d 102 (3 Cir. 1969).

In the instant case, the government during opening statement commented to the jury as follows:

> "Count III charges Robert Young with persuading and inducing a woman by the name of Sally Burns to travel to Wheeling, West Virginia. You will hear Sally Burns testify this morning. She will be our first witness. She is going to tell you the truth. She is going to tell you how it all happened." (Emphasis supplied) (TR. 115)

Thereafter, defendants objected to these remarks and moved that a mistrial be declared (TR. 117). The Trial Court, denying defendants' motion for a mistrial, instructed the jury to disregard the comments of the prosecutor. (TR. 118)

In *Gradsky v. United States*, 373 F 2d 706, 709-710 (5 Cir. 1967), the Appellate Court was faced with an analogous situ-

ation when an Assistant United States Attorney made similar remarks to the jury. Reversing the conviction, the Court stated:

> "Here it is impossible to construe the language used by the prosecuting attorney in any way other than saying that the government had run a check on these two witnesses and had concluded on the basis of such check, obviously out of the ken of the jury, that they were speaking the truth . . . [I]n two places the attorney's statements represented to the Jury that the government's belief in the credibility of the witness was based on something other than the evidence of record. He first said that, 'The government representatives don't put a witness on the stand unless there appears to be some credibility until he appears to be a truthful witness'. This could not appear before the government puts a witness on the stand, unless there had been some kind of check run on the witness prior to his being used. Thus, it is self-evident that the government's vouching of the witness was based on something 'other than the testimony of those witnesses before the jury.'
>
> "This statement by the Assistant United States Attorney was error; it was highly prejudicial; and may have contributed substantially to the verdicts of the jury which are on appeal here. The statement, therefore, makes it necessary that the judgment of conviction and sentences be reversed." *Gradsky, supra,* at 710.

In *Dunn v. United States,* 407 F 2d 833, 885-886 (5 Cir. 1962), the United States Attorney made several improper remarks to the jury during his opening statement. Finding the prosecutor's remarks prejudicial and affecting the substantial rights of the defendant, the Court stated:

> "In the instant case, 'zeal outran fairness' in our judgment. At the outset, the jury was told that the prosecutor's opinion in the case was the most flagrant he had ever tried and was replete with fraud. At this point, it would

> have been relatively simple for the Court to have discharged the jury who heard the prejudicial remarks and impaneled another one. It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant. *Taliaferro v. United States,* 47 F. 2d 699 (9 Cir. 1931).
>
> "The fact that the Court told the jury to 'disabuse your minds of that statement' cannot remove the prejudice. This Court reversed a conviction for improper argument, in *Ginsberg v. United States,* 257 F 2d 950 (5 Cir. 1958), where there was no objection to the argument and no corrective charge given. The Court stated:
>
> "We hold this statement of the prosecuting attorney constituted 'plain error * * * affecting substantial rights' under Rule 52(b) 18 U.S.C.A., governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial."

See also, *McMillian v. United States,* 363 F. 2d 165 (5 Cir. 1966); *United States v. Senano,* 496 F. 2d 81 (5 Cir. 1974).

Petitioners submit that the prosecutor's remarks within the instant case were improper, prejudicial and affected their substantial rights to a fair trial. As a result, this prejudice could not have been cured by an instruction from the Trial Court telling the jury to disregard the comments. The statement, "she is going to tell you the truth", is nothing more than a personal opinion of an attorney which has no place—before a jury during opening statement or any time. In view of the fact that this comment occurred during opening statement, it would have been a relatively simple matter to discharge the jury who heard the prejudicial comments and select another. Instead, the Trial

Court chose simply to instruct the jury to disregard the comments.

The obvious disconcern of the Trial Court points up the need for a clear-cut statement by this Court regarding the procedure to be followed in remedying such a situation.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted

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APPENDIX

UNITED STATES of America, Plaintiff-Appellee,

v.

Isobel PRINCE, Judy Craft, a/k/a Sandy Woods, Robert Samuel Young, a/k/a Robert Jensen, Melvina Young, a/k/a Tammy Young, Amos Lane Bridges, a/k/a Sonny Bridges, Kathleen Maude Muckenstrum, a/k/a Kim Baker, Liz Wilson, and Colleen Burns, a/k/a Rebecca Williams, Becky, Mitzie, Defendants-Appellants.

No. 74-3463.

United States Court of Appeals, Fifth Circuit.

July 8, 1975.

Defendants were convicted in the United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., for conspiracy to engage in interstate prostitution activities, and certain defendants were convicted of substantive offenses, and they appealed. The Court of Appeals, Bell, Circuit Judge, held that prosecutor's remarks in opening statement that Government's first witness would tell the truth did not create impression that there was other evidence, unknown or unavailable to the jury, on which the prosecutor relied; that there was no need to prove a violation of state law as an essential element of interstate travel or transportation in aid of racketeering enterprises and it was unnecessary to decide constitutionality of West Virginia statute prohibiting prostitution; that instruction that defendant may rely upon evidence brought out on examination of witnesses for the Government did not, taken in context, shift burden of proof to defendants; that a defendant's conviction in another case for conspiracy to engage in interstate prostitution activities involving South Carolina operation and numerous parties not associated with West Virginia operation did not bar prosecution based on the West Virginia operation on theory of double jeopardy; and that evidence that a defendant had worked in house of prostitution and caught money as it was thrown down the stairs by prostitutes after they had collected from customers was insufficient to connect defendant to conspiracy.

Affirmed as to six defendants, reversed as to one defendant.

1. Criminal Law ⇐729(5)

Prosecutor's remarks in opening statement that Government's first witness was going to tell the truth did not create impression that there was other evidence, unknown or unavailable to the jury, on which the prosecutor relied.

2. Threats ⇐8

There is no need to prove a violation of state law as an essential element of interstate travel or transportation in aid of racketeering enterprises, and therefore the failure to define a generic term according to state law is not error. 18 U.S.C.A. § 1952.

3. Prostitution ⇐5

Lack of definition of "prostitution" within West Virginia statute prohibiting same did not vitiate convictions for conspiracy to engage in interstate prostitution activities in violation of statute prohibiting interstate travel or transportation in aid of racketeering enterprises inasmuch as term "prostitution" is a generic term and the trial court sufficiently described the offense as "sexual intercourse for hire." 18 U.S.C.A. § 1952; Code W.Va., 61-8-5(b).

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4. Prostitution ⇐4

Evidence in prosecution for engaging in interstate prostitution activities in violation of statute prohibiting interstate travel or transportation in aid of racketeering enterprises was sufficient to sustain verdict that prostitution was committed. 18 U.S.C.A. § 1952; Code W.Va., 61–8–5(b).

5. Criminal Law ⇐778(5)

Instruction that a defendant may rely on evidence brought out on examination of witnesses for the Government did not shift burden of proof to defendant.

6. Criminal Law ⇐822(11)

Reviewing court is required to consider a jury instruction in its entirety and even if a portion of the charge, standing alone, would appear to shift the burden of proof to the defendant, there is no error if the jury is sufficiently informed where the burden lies.

7. Criminal Law ⇐789(2)

Record on appeal from convictions in connection with interstate prostitution activities disclosed no error in instruction on reasonable doubt. 18 U.S.C.A. §§ 1952, 2422.

8. Criminal Law ⇐282(1)

Fact that defendant had been convicted of conspiracy to engage in interstate prostitution by reason of activities in South Carolina operation did not bar, on double jeopardy principles, prosecution for similar conspiracy involving West Virginia operation where there were numerous parties associated only with the South Carolina operation or the West Virginia operation but not with both and there was no evidence that either of the ventures depended for its success on the other. 18 U.S.C.A. § 1952; Code W.Va., 61–8–5(b).

9. Conspiracy ⇐47(1)

Once a conspiracy is shown to exist, slight evidence is all that is required to connect a particular defendant with the conspiracy.

10. Conspiracy ⇐47(1)

To connect a particular defendant with a conspiracy, the proof must be individual and personal and Government must prove beyond a reasonable doubt that each member of the conspiracy had the deliberate, knowing, and specific intent to join the conspiracy; mere association with conspirators or knowledge of the illegal activity is not sufficient.

11. Conspiracy ⇐47(3)

Evidence that defendant had a job in house of prostitution and on occasion caught money as it was thrown down the stairs by prostitutes after they had collected from customers was insufficient to bind defendant to conspiracy to engage in interstate prostitution activities. 18 U.S.C.A. § 1952; Code W.Va., 61–8–5(b).

Appeals from the United States District Court, Southern District of Florida.

Before BELL, DYER and SIMPSON, Circuit Judges.

BELL, Circuit Judge:

This is an appeal by defendants Robert Young, Amos Lane Bridges, Melvina Young, Kathleen Maude Muckenstrum, Judy Craft, Colleen Burns, and Isobel Prince from convictions on one count of conspiracy to engage in interstate prostitution activities in violation of Title 18, U.S.C.A. § 1952, and by defendants Robert Young, Amos Lane Bridges, and Melvina Young from convictions on one count of inducing a woman to engage in interstate prostitution activities in violation of Title 18, U.S.C.A. § 2422. In addition, Robert Young, Bridges, and Muckenstrum appeal from convictions on one count of engaging in interstate prostitution activities in violation of Title 18, U.S.C.A. § 1952. Defendants assert numerous errors in the proceedings of the district court; some assignments are assigned collectively, some individually. We find no error in those collective assignments or in Muckenstrum's claim of double jeopardy. We reverse as to appellant Prince.

Appellants first complain that a mistrial should have been declared due to certain remarks made by government counsel. During the opening statement, Counsel stated:

> . . . you will hear Sally Burns testify this morning. She will be our first witness. She is going to tell you the truth. She is going to tell you how it all happened . . .

An objection was made to these remarks and it was moved that a mistrial be declared. The motion was denied and the jury was instructed to disregard the comments of the prosecutor.

[1] This court has cautioned that it is "dangerous business" for a prosecutor to state to the jury that the United States government vouches for the honesty or veracity of its witnesses. Gradsky v. United States, 5 Cir., 1967, 373 F.2d 706, 710; McMillian v. United States, 5 Cir., 1966, 363 F.2d 165. The test as to whether the prosecutor has expressed an improper opinion is "whether the prosecutor's expression might reasonably lead the jury to believe that there is *other evidence*, unknown or unavailable to the jury, *on which* the prosecutor" relied. 363 F.2d 169 (Emphasis supplied). The remarks in the present case do not create such an impression. The cautionary instruction given by the court was sufficient to avoid error in the failure to grant a mistrial.

Appellants next attack the statute under which they were prosecuted. They argue that to be in violation of 18 U.S.C.A. § 1952 they must be found to be in violation of 61–8–5(b), West Virginia Code. That statute prohibits "prostitution . . . or procur[ing] another to commit an act of prostitution." It is submitted that because the term "prostitution" is not defined within the statute, that it is unconstitutionally void.

[2–4] This court has recently held, however, that in § 1952 cases state law "merely serves a definitional purpose." United States v. Conway, 5 Cir., 1975, 507 F.2d 1047, 1051. There is no need to prove a violation of the state law as an essential element of the federal crime and therefore the failure to define a generic term according to state law is not error. *Id.* In *Conway*, we looked to United States v. Nardello, 1969, 393 U.S. 286, 89 S.Ct. 534, 21 L.Ed.2d 487, where the Supreme Court held that prosecutions under § 1952 were not restricted to state labels, but that it is sufficient for the acts to fall within the "generic term" charged. We need not concern ourselves, then, with the lack of a definition of "prostitution" within the West Virginia statute. That term is also a generic term and the definition of the trial court "sexual intercourse for hire" sufficiently described the offense. It is therefore unnecessary for us to decide the constitutionality *vel non* of the statute. We further find that there was sufficient evidence presented to sustain a verdict that prostitution was committed.

[5] A third assignment of error looks to the jury instructions on burden of

proof and on reasonable doubt.[1] Appellants point to one sentence of the charge as possibly shifting the burden of proof impermissibly from the government to them. They also object to the overall tone of the charge as being too strict upon the defendants. We also find no error in those contentions. The sentence complained of, that "he [the defendant] may rely upon evidence brought out on examination of witnesses for the government" is somewhat ambiguous but, taken in context, it does not shift the burden of proof to defendants.

[6, 7] We are required to consider a jury instruction in its entirety. Even if a portion of the charge, standing alone, would appear to shift the burden of proof to the defendant, there is no error if the jury is sufficiently informed where the burden lies. Todd v. Stynchcombe, 5 Cir., 1973, 486 F.2d 1030, 1031. In the charge before us, the jury was told repeatedly that the burden rested on the government, and the government alone, and that the burden never shifted throughout the trial. Likewise, we find no error in the instruction on reasonable doubt.

[8] Appellant Muckenstrum individually argues that her prosecution in this case was barred by principles of double jeopardy. She was indicted and convicted in United States v. Muckenstrum, 5 Cir., 1975, — F.2d —, also decided this day. That case also charged a conspiracy to engage in interstate prostitution activities in violation of 18 U.S.C.A. § 1952. Muckenstrum contends that the two conspiracies were really one continuing conspiracy and points to similarity of parties, witnesses, dates and acts for support. The only difference, according to her theory, is the point of travel: South Carolina in one instance, West Virginia in the other. While Muckenstrum and James Reed were common to both cases,[2] there were numerous other parties who were associated only with the South Carolina operation or the West Virginia operation but not with both. There is no evidence that the South Carolina conspiracy depended in any way on the West Virginia venture for its success or vice versa, or that they were a part of one operation. Although the two conspiracies were similar in nature, it is clear that they were not sufficiently related to establish one conspiracy. Thus jeopardy did not attach to Muckenstrum in the first proceeding such that the second was barred. *See* Dryden v. United States, 5 Cir., 1968, 403 F.2d 1008, 1009.

[9, 10] Appellant Isobel Prince challenges her conviction on the grounds that there was insufficient evidence to bind her to the conspiracy. This circuit

1. The jury instructions in question are as follows:

> The burden of proving a defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or produce any evidence. He may rely upon evidence brought out on examination of witnesses for the Government. If the Government fails to prove a defendant guilty beyond a reasonable doubt, the jury must find him not guilty.
>
> A reasonable doubt means a doubt that is based on reason and common sense. It does not mean a mere possible doubt or a speculative or imaginary or forced doubt, because anything related to human affairs is open to some possible or imaginary doubt. It is the kind of doubt which would cause a reasonable person to hesitate in making a decision or in taking an important step in some serious matter in his own private affairs.

2. The jury could not reach a decision as to Reed and he was dismissed with prejudice.

has long adhered to the rule that once a conspiracy is shown to exist, slight evidence is all that is required to connect a particular defendant with the conspiracy. United States v. Reynolds, 5 Cir., 1975, 511 F.2d 603, 607; United States v. Warner, 5 Cir., 1971, 441 F.2d 821, 830; Lopez v. United States, 5 Cir., 1969, 414 F.2d 909, 911. The proof, however, must be individual and personal and the government must prove beyond a reasonable doubt that each member of the conspiracy had the deliberate, knowing, and specific intent to join the conspiracy. Mere association with conspirators or knowledge of the illegal activity is not sufficient. United States v. Falcone, 1940, 311 U.S. 205, 210–11, 61 S.Ct. 204, 85 L.Ed. 128; United States v. Miller, 5 Cir., 1974, 500 F.2d 751, 764; United States v. Morado, 5 Cir., 1972, 452 F.2d 167, 175; Roberts v. United States, 5 Cir., 1969, 416 F.2d 1216, 1220; Causey v. United States, 5 Cir., 1965, 352 F.2d 203, 206. Here the only evidence relating to Prince is that she had a job in the house of prostitution in Wheeling, West Virginia and that on occasion she caught money as it was thrown down the stairs by prostitutes after they had collected from customers. She was not connected to management other than by her presence and by catching the money. There was no evidence that she knew of the conspiracy charged or that she was in any way associated with the interstate aspect of the prostitution endeavor.

[11] Viewing the evidence in the light most favorable to the government as we are required to do, we nevertheless conclude that there was not sufficient evidence presented as to Prince and her conviction is reversed.

We find no merit in the hearsay evidence contention.

Affirmed as to appellants Robert Young, Bridges, Melvina Young, Muckenstrum, Craft, and Burns.

Reversed as to appellant Isobel Prince.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 75-390

In the Supreme Court of the United States

OCTOBER TERM, 1975

JUDY CRAFT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the statute under which they were convicted is unconstitutionally vague, (2) that the prosecutor impermissibly vouched for the credibility of a government witness in his opening statement, and (3) that the trial court erroneously instructed the jury on the burden of proof in a criminal case.

After a jury trial in the United States District Court for the Southern District of Florida, each peti-

tioner was convicted of conspiracy to engage in unlawful interstate prostitution activities, in violation of 18 U.S.C. 371. In addition, petitioners Robert Young, Amos Bridges and Melvina Young were convicted of inducing a woman to engage in interstate prostitution activities, in violation of 18 U.S.C. 2422; and petitioners Robert Young and Bridges were convicted of engaging in interstate prostitution activities, in violation of 18 U.S.C. 1952.[1] Petitioners Robert Young and Bridges were sentenced to consecutive three-year terms of imprisonment for each of their three violations; petitioner Melvina Young received concurrent 90-day sentences for each of her convictions; and petitioners Judy Craft and Colleen Burns were sentenced to 60-day terms for the sole charge on which they were convicted.[2] The court of appeals affirmed as to all petitioners (Pet. App. A).

The evidence adduced at trial demonstrated that petitioners Robert Young, Amos Bridges and Melvina Young operated a prostitution ring out of Miami, Florida. In the course of their conspiracy, they had several of their employees travel to a house of prostitution in Wheeling, West Virginia, known as "Bob-

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[1] Defendant Kathleen Muckenstrum was also convicted of engaging in interstate prostitution activities and conspiracy to do so. She has filed a separate petition for a writ of certiorari, *Muckenstrum* v. *United States*, No. 75-391, August 18, 1975.

[2] Petitioners Young, Craft, and Burns were accorded "split sentence" treatment pursuant to 18 U.S.C. 3651, and substantial portions of their jail terms were suspended; they were also placed on probation for two years.

by's Place." Specifically, Sally Burns testified that, beginning in the late summer of 1971, she became a prostitute working for petitioner Robert Young (Tr. 136-138). Along with petitioner Judy Craft, Burns engaged in prostitution at various Miami hotels, the proceeds of which were subsequently turned over to Robert Young (Tr. 138-140, 141).

At Young's request, Burns traveled to Wheeling, West Virginia, in September, 1971, where Craft and she worked as prostitutes at "Bobby's Place" for approximately three weeks (Tr. 142, 149). At least one-half of Burns' earnings for that period were transferred directly to Robert Young in Miami (Tr. 150-151). Burns continued to work as a prostitute for Young upon returning to Miami (Tr. 153-154) and subsequently returned to Wheeling to work at "Bobby's Place (Tr. 155)."

Patricia Jordan testified that, during the latter part of 1972, petitioner Colleen Burns trained her to work as a prostitute for petitioner Amos Bridges (Tr. 475-476) and that she and Bridges resided in a Miami cottage rented by petitioner Robert Young (Tr. 470-471, 450). At Bridges' behest, Jordan traveled to "Bobby's Place" in Wheeling on two separate occasions for prostitution purposes (Tr. 486, 493). Robert Young telephoned the proprietor of "Bobby's Place" to arrange Jordan's first trip to Wheeling (Tr. 497-498), and Jordan remitted a portion of her West Virginia earnings to Bridges after each trip (Tr. 492, 495-496).

Another prostitute, Dianne Rinaldi, testified that

she had received on-the-job training as a prostitute from petitioner Melvina Young, and that Young had also made the transportation arrangements for her trip to "Bobby's Place" (Tr. 692, 696). Bridges asked that she return to Miami with any money she might earn in West Virginia (Tr. 703). Rinaldi identified codefendant Muckenstrum and petitioner Craft as her fellow workers during her stay at the West Virginia house of prostitution (Tr. 700).

1. Petitioners contend (Pet. 7) that the statute under which they were convicted is unconstitutionally vague. Petitioners argue that Section 61-8-5(b), Ann. West Virginia Code,[3] was incorporated by reference into the Travel Act for purposes of their federal prosecution. The Travel Act generally bars interstate travel for the purpose of carrying on "any unlawful activity," and defines the latter term to include "any * * * prostitution offenses in violation of the laws of the state in which they are committed * * *" (18 U.S.C. 1952). Petitioners urge that since the term "prostitution" has been defined in various ways by the courts and legislatures of the states, and since the term is not otherwise defined in the West Virginia statute and has not been construed by the West Virginia courts, the coverage of the West Virginia prostitution statute is so uncertain as to render it void for vagueness under the Due Process Clause.

Petitioners erroneously construe the interplay be-

[3] Section 61-8-5(b), 17 Ann. West Virginia Code (1966), prohibits, *inter alia*, "prostitution * * * or procur[ing] another to commit an act of prostitution."

tween the Travel Act and state law. In *United States* v. *Nardello*, 393 U.S. 286, this Court held that under the Travel Act, Congress intended that the enumerated "unlawful activities" should be interpreted generically. *Id.* at 296. In order to sustain a conviction, the particular state statute incorporated under Section 1952 must prohibit the general activity charged, and the precise manner in which that state defines the crime is irrelevant. *Id.* at 295. The West Virginia statute bars "prostitution," and since its particular terminology is not controlling, its failure to define that term does not bar these convictions. *Id.* at 293-294. As the court of appeals properly held (Pet. App. A-3), the trial court's characterization of prostitution as "sexual intercourse for hire" (Tr. 875) unquestionably falls within the generic definition and is therefore sufficient under *Nardello*. Webster's *Third New International Dictionary* 1822 (1961); see also *United States* v. *Chambers*, 382 F. 2d 910 (C.A. 6); *United States* v. *Cozzetti*, 441 F. 2d 344 (C.A. 9). See 6 Michie's *Jurisprudence of Virginia and West Virginia* 249 (1949).

In any event, the West Virginia prostitution statute is not unconstitutionally vague as applied to petitioners' conduct.[4] While their petition cites various

[4] Since petitioners do not contend that the activities for which they were prosecuted comprehended any element of expression protected by the First Amendment, the higher degree of linguistic precision required to withstand a vagueness challenge in such cases is not applicable here. *Grayned* v. *City of Rockford*, 408 U.S. 104, 109.

authorities applying the term "prostitution" to a wide-range of activities, there can be no question that the term covers "sexual intercourse for hire." Thus, whatever may be the applicability of the West Virginia statute to borderline cases, petitioners were given fair notice that it covered these activities. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108; see *Smith* v. *Goguen*, 415 U.S. 566, 579.

2. Petitioners claim (Pet. 15) that the prosecutor improperly vouched for the credibility of government witness Sally Burns in the following portion of his opening statement to the jury:

> You will hear Sally Burns testify this morning. She will be our first witness. She is going to tell you the truth. She is going to tell you how it all happened [Tr. 115].

The prosecutor's remarks, however, could not reasonably have led the jury to believe that there was other evidence, unknown or unavailable to the jury, on which he relied in his assessment of Burns' credibility. *McMillian* v. *United States*, 363 F. 2d 165, 169 (C.A. 5); see also *Lawn* v. *United States*, 355 U.S. 339, 359, n. 15. His characterization of Burns' testimony was more hortatory than descriptive and in no way implied that he possessed some superior knowledge of Burns' trustworthiness; rather, it suggested that her credibility would be established by her testimony before the jury. See *Gradsky* v. *United States*, 373 F. 2d 706 (C.A. 5). Moreover, the trial judge instructed the jury to disregard the prosecutor's comments. The court of appeals correctly held (Pet. App.

A-3) that this cautionary instruction adequately assured that the jury would evaluate the witness' testimony objectively and that petitioners would not be prejudiced by this comment.

3. Petitioners also challenge (Pet. 12-15) the trial court's instruction to the jury on the burden of proof and the meaning of reasonable doubt. They argue (Pet. 12) that in charging the jury (Tr. 859) that a defendant "may rely upon evidence brought out on examination of witnesses for the Government," the trial court imposed at least a minimum burden of proof on them. The court of appeals properly rejected this contention (Pet. App. A-4), finding that the trial court had emphasized throughout its instructions that the burden of proof rested upon the government, that the burden never shifted to petitioners, and that the law did not require them to prove their innocence or produce any evidence. The charge as a whole made it clear that the burden of proof rested entirely on the government and thus did not constitute error. *Leland* v. *Oregon*, 343 U.S. 790, 795.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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